IN THE

Supreme Court of the United States.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

CLARENCE T. BIRKETT, Plaintiff-in-error,
AGAINST
THE COLUMBIA BANK, Defendant-in-error.

No. 267.
October Term, 1903.

This appeal brings up for review a judgment of the supreme court of the state of New York in favor of the defendant-in-error and against the plaintiff-in-error, entered upon the decision of the court of appeals, affirming a judgment entered in the supreme court of the state of New York, in favor of the defendant-in-error and against the plaintiff-in-error for the sum of $836.63, damages, and $124 costs. (Fol. 16.)

FACTS.

This action was brought by The Columbia Bank against Birkett to recover on a promissory note made by Russell & Birkett to the order of the Manhattan Railway Advertising Company for the payment of the sum of $750 April 5th, 1899. (Fols. 8-9.)

The answer admitted the making of the said note, by the firm of Russell & Birkett (Russell having died prior to the commencement of the action), to the order of the Manhattan Railway Advertising Company, its endorsement to The Columbia Bank, and that The Columbia Bank was a bona fide holder for value. (Fol. 10.)

For further defense the said Birkett (the surviving partner) pleaded a discharge in bankruptcy in favor of the said firm of Russell & Birkett, which discharge in bankruptcy was granted on the 12th day of September, 1899. (Fols. 10 and 11.) The action was tried at a trial term of the supreme court, the Hon. John Proctor Clarke presiding, a jury having been waived (fol. 21), and the trial court made findings of fact and conclusions of law (fols. 13 to 15) and directing the entry of a judgment in favor of The Columbia Bank against the defendant for the sum of $836.63, being the amount of the note, with interest, together with the costs. (Fol. 15.) An appeal was then taken to the appellate division of the supreme court of the state of New York, which affirmed the judgment (fols. 35 and 36), and a further appeal was then taken to the court of appeals of the state of New York, which handed down a decision on the 6th day of March, 1903, affirming the judgment of the court below in all things and remitting the case to the supreme court to be enforced according to law. (Fols. 1 to 4.) Thereupon a judgment was entered in the supreme court of the state of New York making the judgment of the court of appeals the judgment of the supreme court. The plaintiff-in-error then sued out a writ of error to the supreme court of the state of New York (fols. 52 and 53), by which this case is brought to this court for review.

Prior to the commencement of the action Calvin Russell, of the firm of Russell & Birkett, died, and the action was brought against Clarence T. Birkett. The note due April 5, 1899, had been given in renewal of a prior note, and on or about the 25th day of March, 1899, Russell & Birkett wrote the Manhattan Railway Advertising Company requesting a further extension of time. The Manhattan Railway Advertising Company replied to that letter (fols. 25 and 26), stating that the note was held by The Columbia Bank and that they could grant no further extension. Thereupon, Russell & Birkett wrote The Columbia Bank requesting an extension from the 5th of April, 1899, to the 12th of April, 1899 (fol. 27), which extension was granted. On or about the

12th day of April, 1899, Russell & Birkett filed a voluntary petition in bankruptcy, praying that they be adjudicated bankrupts (fol. 27), and on the 15th day of April, 1899, at a term of the district court of the United States, northern district of New York, Russell & Birkett, copartners, and Calvin Russell and Clarence T. Birkett, individually, were duly adjudicated bankrupts. (Fol. 29.) Attached to their voluntary petition were the schedules required by law, and in the schedules (page 17 of the transcript) the note was stated, the name of the creditor given as the Manhattan Railway Advertising Company of New York. No notice to attend the first meeting of the creditors was given by the bankrupts to The Columbia Bank (fol. 14), but The Columbia Bank had actual knowledge of the bankruptcy proceedings in time to prove their claim and have it allowed (fols. 24 and 25), they being informed that Russell & Birkett had gone through bankruptcy, and that the proceeding was before Charles A. Hawley, Esq., referee, at Seneca Falls, N. Y. (Fol. 25.) Russell & Birkett as a firm and individually were duly discharged. (Fol. 30.) When the action was brought and tried a jury was waived and the making and endorsement of the note were admitted (fol. 21); the plaintiff-in-error (Birkett) then offered in evidence the adjudication in bankruptcy and the discharge in bankruptcy. (Fol. 22.) The plaintiff-in-error was then examined as a witness and the facts above referred to were brought out (fols. 23 to 28); the findings of fact made by the trial court will be found at folios 13 to 15, together with the conclusions of law. There is no finding of fact that The Columbia Bank did not have actual knowledge of the proceedings in bankruptcy. The findings made by the trial court with reference to that were as follows:

VIII. That thereafter, to wit: On the 13th day of April, 1899, the said firm of Russell & Birkett, the defendants, upon their own petition, were adjudicated bankrupts in the United States district court for the northern district of New York, and that on September 12, 1899, the said defendants were discharged in bankruptcy.

IX. That the claim of the plaintiff upon the said promissory note and the debt of said firm of Russell & Birkett, and the said defendant, upon said promissory note to the plaintiff were not duly scheduled in time for proof and allowance. That the name of the plaintiff which, at the time of the filing of their schedules in bankruptcy, was known to the bankrupts to be the owner and holder thereof and the creditor of said bankrupt by reason thereof, and that such plaintiff had no notice or actual knowledge or other knowledge of the said proceeding in bankruptcy *prior to the discharge of the bankrupts therein.*" (Fol. 14.)

It will be noted that the note fell due on the 12th day of April, 1899. (Fol. 27.) The petition in bankruptcy was filed about the 13th day of April, 1899 (fol. 27); the adjudication in bankruptcy was made on the 15th day of April, 1899 (fol. 29); the discharge in bankruptcy was granted September 12, 1899. (Fol. 30.) The first meeting of the creditors was held May 2, 1899 (fol. 32), and the year in which the plaintiff might have filed its claim for proof and allowance expired April 15, 1900. The Columbia Bank, the defendant-in-error, had actual knowledge of the bankruptcy proceedings on or about the 17th of November, 1899 (see letters—fols. 24 and 25), and the trial court did not find that The Columbia Bank had no knowledge of the proceedings in bankruptcy, but simply found that The Columbia Bank had no actual knowledge of the proceedings in bankruptcy *prior to the discharge.*

Assignment of Errors.

The defendant assigns the following errors in the final decision of the court of appeals filed herein about March 17, 1903:

I. The court erred in holding and deciding that the claim of The Columbia Bank was not discharged by the discharge in bankruptcy.

II. The court erred in deciding that The Columbia Bank did not have actual knowledge of the proceedings in bankruptcy in time to file and prove its claim.

III. The court erred in holding and deciding that the debt of Russell & Birkett and of the defendant was not released by the discharge in bankruptcy.

IV. The court erred in deciding that the defendant was indebted to the plaintiff in the sum of $750.00, with interest from the 15th day of April, 1899, and that the said debt is still due and owing.

V. The court erred in deciding that the discharge granted by the United States district court for the northern district of New York on the 12th day of September, 1899, being the court having jurisdiction of the bankruptcy proceedings against the firm of Russell & Birkett and the defendant individually, did not duly discharge the defendant from all debts, claims and obligations existing against him or Russell & Birkett on the 15th day of April, 1899, the date when such discharge was granted.

VI. The court erred in deciding that the discharge was not evidence of the jurisdiction of the court, the regularity of the proceedings and the fact that such discharge was made.

VII. The court erred in refusing to decide that the burden of proof was with The Columbia Bank to establish that its claim was not discharged by the discharge in bankruptcy, but that it was excepted therefrom, within the meaning of section 17 of the Bankruptcy Law.

VIII. The court erred in its construction of section 17 of the Bankruptcy Law, being laws of Congress, 1898, chapter 541, and particularly erred in its construction of subdivision 3 of said section 17 by holding that said section did not apply to this case, and that the discharge of the debt of Russell & Birkett and the defendant individually did not release and discharge the claim of The Columbia Bank.

IX. The court erred in ruling and deciding that the claim of The Columbia Bank was not within the intent and meaning of the

Bankruptcy Law, and particularly within the intent and meaning of section 17.

THOMAS CARMODY,
Attorney for Defendant.

Office and post-office address,
Penn Yan, N. Y.

POINT I.

No duty is imposed by the Bankruptcy Law upon a bankrupt to give notice to his creditors. The Bankruptcy Law, section 58, providing for a notice to the creditors of the different hearings, meetings, sales and other matters connected with the bankruptcy proceeding, also provides, subd. c., "*All notices shall be given by the referee* unless otherwise ordered by the judge." Hence, Russell & Birkett, or Birkett, the defendant-in-error here, cannot be chargeable with any neglect if notice in writing was not sent to The Columbia Bank. The only duty imposed upon the bankrupt is that found in section 7 of the law, requiring him to "prepare, make oath to, and file in the court, within ten days * * * a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail and the list of his creditors, showing their residences, if known; if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and (9) when present at the first meeting of his creditors and at such other times as the court shall order, submit to an examination concerning the conduct of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and in addition all matters which may affect the administration and settlement of his estate."

Section 21 of the Bankruptcy Law provides (subdiv. f) "that a certified copy of an order discharging a bankrupt shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made." Provision is also made by general order 11 in bankruptcy for an amendment of the petition and schedules.

It is unquestioned, and the court so finds, that the plaintiff-in-error was duly discharged by the United States district court, northern district of New York, the court having jurisdiction of the person and property of the plaintiff-in-error, and that discharge is evidence, not only of the jurisdiction of the court but the regularity of the proceedings. It is evidence that the plaintiff-in-error duly prepared and filed his schedules, appeared for examination at the first meeting of creditors and was examined as to all matters relating to his property, his creditors and the cause of his bankruptcy. It is further evidence of the fact that the plaintiff-in-error had complied with the requirements of the Bankruptcy Law and was discharged because he was entitled to the discharge. (Section 14, subdivision b, and section 29, subd. b (2).) It is evidence that he made a due return in his schedules with reference to all property owned by Russell & Birkett, or himself, and place before the referee and the creditors attending the meeting all information concerning the property of the firm and of himself and the names of his creditors, and there is no question anywhere in the case that he did not do this. The plaintiff-in-error made all the proof required by law when he offered in evidence the discharge, and the burden of proof was then with the defendant-in-error to show that it was not notified or that it did not have actual knowledge of the pendency of the proceedings in time to file its claim, and have the same allowed. They offered no evidence whatever on this point. When the plaintiff-in-error did these things he had complied with the law, and as we have seen the duty of notifying creditors was imposed upon the referee in bankruptcy and not upon the bankrupt. Congress undoubtedly intended in making this provision, to provide for notice to all of the creditors

of the bankrupt. Doubtless congress believed that there might be cases where the bankrupt would either intentionally or by inadvertence fail to notify creditors, and so in order that creditors might have notice the law directed that the bankrupt should make schedules and file them with the clerk of the court, the referee in bankruptcy and the trustee in bankruptcy, and that he should appear at the meeting of the creditors and be examined fully and thoroughly with reference to his affairs. Should it then appear that the creditors have not been notified or that claims have been presented that are not properly allowable, it becomes the duty of the referee to notify those creditors who had not received notice and to so supervise the collection of the bankrupt's assets and the allowances of the claims against the estate as to bring about a proper distribution of the estate among those who are actually the creditors of the bankrupt. Not only that, but the law went even further, and this is additional evidence of the intent of the act by providing for the revocation of a discharge (Section 15.) It makes provision for the allowances of claims (section 65) which are not offered for proof and allowance until after a dividend has been granted and permitting those creditors to come in and share equally with the others; and so all through the act and the general orders in bankruptcy it clearly appears that Congress realized the fact that not only mistakes, but frauds were apt to occur, and it made provision not only for the amendments of schedules and papers in the proceeding (General Order 11), but provision for revoking discharges, setting aside compositions, permitting creditors whose claims were not scheduled to come in at any time within a year after the petition was filed and prove their claims and have them allowed, permitting creditors to attack claims that had been proved and allowed and have them reconsidered and rejected, providing for creditors whose claims were not proved and allowed until after dividends were granted, and permitting them to come in and receive out of the balance of the fund in the trustees' hands an amount equal to that received by the other creditors upon their dividends, and the law also placed, not upon the bankrupt, but

upon the referee in bankruptcy, the duty of giving notice of all proceedings in bankruptcy to the creditors.

As we have seen, the discharge was evidence of the regularity of the proceeding, and the burden of proof was, of course, upon The Columbia Bank to show that it was not within the effect of the discharge. The Bankruptcy Law, moreover, in providing for the discharge of debts, recognizes the fact that names of creditors and claims may, under some circumstances, be omitted from the schedules. Section 17 of the Bankruptcy Law provides as follows: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy." Conceding here that the claim of The Columbia Bank was not properly scheduled, nevertheless, The Columbia Bank did have actual knowledge of the proceedings in bankruptcy. At pages 12 and 13 of the Transcript of Record appears two letters, one dated November 6, 1889, and written by the president of The Columbia Bank to the president of the Baldwin Bank of Penn Yan, Penn Yan, N. Y., the home and residence of the plaintiff-in-error, which reads as follows:

"Columbia Bank, Fifth Avenue and 42d St.

New York, *Nov.* 6, 1899.

M. L. Baldwin, Esq., *President Baldwin's Bank of Penn Yan, Penn Yan, N. Y.:*

Dear Sir.— Messrs. Russell & Birkett, of your city, who failed some time ago, are indebted to us in the sum of seven hundred and fifty dollars ($750) for a note we discounted.

We understood some little time ago that they were about to reorganize their business, and form a corporation, and were to give their creditors stock in the newly-organized company for their indebtedness.

Will you kindly inform us if these people have gone on in business, and, if not, what condition their affairs are in.

Thanking you in advance, and holding ourselves in readiness to reciprocate the favor at any time, I remain,

Very truly yours,

JOSEPH FOX, *Pres't.*"

Mr. Baldwin's answer appears at the bottom of said letter and reads as follows:

"They have been through bankruptcy, and now C. T. Birkett, one of the old firm, is carrying on the business same as formerly, doing a big business.

M. L. BALDWIN."

At the top of page 13 will be found the following letter written by the president of The Columbia Bank to the president of the Baldwin Bank:

"COLUMBIA BANK, FIFTH AVENUE AND 42D ST.

NEW YORK, *Nov.* 17, 1899.

M. L. BALDWIN, Esq., *President Baldwin's Bank of Penn Yan, Penn Yan, N. Y.:*

DEAR SIR.— I received your reply to my letter of the 6th instant, for which I thank you, and desire to trouble you again, namely, to ask you in which district Russell & Birkett passed through bankruptcy, as we were not aware, and never received notification, that any such proceedings had taken place.

Thanking you again for the trouble I am putting you to, and always ready to reciprocate the favor, I remain,

Very truly yours,

JOSEPH FOX, *Pres't.*"

Mr. Baldwin answered by stating that Russell & Birkett had passed through bankruptcy in the northern district of New York,

Charles A. Hawley, referee, Seneca Falls, N. Y. The petition in bankruptcy was filed April 13, 1899, and the adjudication in bankruptcy was made April 15, 1899. The Columbia Bank had actual knowledge of the bankruptcy proceedings November 17, 1899, and thereafter had until April 15, 1900, to file its claim with the referee in bankruptcy and have it allowed, or to apply to the bankruptcy court for the northern district of New York for a revocation of the discharge. It did none of these things. Having actual knowledge of the bankruptcy proceeding in time to file and prove its claim it did nothing.

POINT II.

Pleading the discharge in bankruptcy and proving the same established *prima facie* a complete defense to this action. The claim of the defendant-in-error was in existence and a provable debt against the bankrupt's estate, and the defendant-in-error had actual knowledge of the bankruptcy proceeding in time to prove its claim and have it allowed, and the presumption is that it was barred by the discharge. And hence the burden of proof was with The Columbia Bank to show not only that it had no notice of the proceeding in bankruptcy, but that it had no actual knowledge.

Fider v. Manheim, 81 N. W. Rep., 2.

Jones v. Walter, 74 Southwestern Rep. (Ky.), 249.

Zimmerman v. Ketchum, 71 Pacific Rep. (Kas.), 264.

Smith v. Wheeler, 55 App. Div., 170.

Lamb v. Brown, 14 Fed. Cases, 988; 12 N. B. R., 522.

Carey v. Mayor, 79 Fed. Rep., 926.

White v. Howe, 29 Fed. Cases, 1019; 3 MacLean, 291.

Lathrop v. Stewart, 14 Fed. Cases, 1185; 5 MacLean, 167.

POINT III.

The discharge in bankruptcy was properly pleaded. The New York Code of Civil Procedure, section 532, provides as follows: "In pleading a judgment, or other determination, of a court or officer, of special jurisdiction, it is not necessary to state the facts conferring jurisdiction; but the judgment or determination may be stated to have been duly given or made. If that allegation is controverted, the party pleading must, on the trial, establish the facts conferring jurisdiction." The answer herein, at page 4, alleges the adjudication in bankruptcy of Russell & Birkett as copartners and individually, and that they "were duly discharged in said bankruptcy proceeding, pursuant to the provision of the act of Congress above mentioned, and that by such a discharge the said firm of Russell & Birkett and this defendant individually were duly discharged from all debts, claims and obligations excepting against them or either of them on the said 15th day of April, 1899."

In Livingston v. Oaksmith (13 Abb., 183) it was held that an allegation that the discharge of an insolvent debtor was duly granted was a sufficient pleading of jurisdictional facts.

In Schermerhorn v. Talman (14 N. Y., 93, 135) the court held that while schedules in bankruptcy might be affirmatively attacked and shown not to be properly executed, yet in the absence of proof the courts would presume that the law was complied with.

In Harrison v. Lourie (49 How. Pr., 124, 127) the court said: "The bankrupt can rest upon his discharge and its effect upon his debts, and a creditor is concluded by it until he shows that his debt is of a nature not extinguished by it."

In Stevens v. King (16 App. Div., 377), in an action upon a promissory note where the defendant pleaded a discharge in bankruptcy, the court used this language: "The burden was upon the plaintiff to attack the discharge and show some cause why the decree of the court was not effectual." The plaintiff there claimed,

as is here claimed, that he was not affected by the discharge because he was not a party to the bankruptcy proceedings.

In McCormick v. Pickering (4 N. Y., 276-280) the court said: "It was not necessary to aver that a notice was published to creditors; that jurisdiction being shown, all the subsequent proceedings are presumed to have been regular."

In Morse v. Cloyes (11 Barb., 100-104) the court held that where a discharge in bankruptcy is offered in evidence jurisdiction will be presumed until the contrary appears.

In Small v. Graves (7 Barb., 577) the court held: "The bare omission by an insolvent debtor, applying to be discharged under the two-thirds act, to insert the name of a creditor in his schedules of debts, or a misstatement of the amount due any creditor, will not alone vitiate the discharge. The omission or misstatement must be intentional."

In Hall v. Robbins (61 Barb., 33), where the defendant had been discharged under the insolvent laws of Massachusetts, the court held that the omission of an insolvent debtor to set forth a particular debt in his petition will not vitiate the discharge as to that particular debt, unless the omission was willful or fraudulent.

In Rayl v. Lapham (27 Ohio St., 452, 15 B. R., 508) the court said: "The statute directs certain acts to be done, and publication to be made for the purpose of affording a reasonable opportunity or notice to creditors, but the proceedings are so far *in rem* that actual notice to the creditors is not essential to the jurisdiction of the court, nor will the want of it invalidate the discharge which the court is empowered to grant to the bankrupt."

It is true that the above cases are all under former bankruptcy acts, but they recognize and establish a principle which does not antagonize the provisions of the present act. The same presumption as to regularity and jurisdiction will be indulged in under the present act.

In Fider v. Manheim (81 N. W. Rep., 2), decided by the court of appeals in the state of Minnesota, the plaintiff was the holder

and owner of defendant's note, which had been transferred to him by the payee named therein in October, 1898. The fact of the transfer was known to the defendant, as he made a payment upon it while it was held by the plaintiff. A few days after such payment the defendant filed his petition in bankruptcy and was duly adjudged a bankrupt. In his schedules filed in the bankruptcy proceedings, the note was scheduled to the payee. The payee was given notice of the first meeting of creditors, and the plaintiff received no notice whatever of the bankruptcy proceedings. In May, 1899, the defendant was discharged. In November, 1898, the fact of defendant's bankruptcy proceedings became known to plaintiff. The court there held that the claim was discharged; that the plaintiff had ample time to file his claim after he obtained knowledge of the bankruptcy proceedings. The only difference of the facts in that case and those of the case at bar is that the plaintiff received notice before the discharge. This fact, however, received no weight from the court.

It would be an unreasonable burden to impose upon a bankrupt to prove that all of the steps by which jurisdiction is acquired, were observed every time a creditor chose to attack his discharge. As well might it be claimed that in pleading a judgment under our practice it is necessary to allege and prove jurisdictional facts, such as the service of summons, etc. It might well be that a bankrupt is unable to prove compliance with the statutory requisites. Proof of these facts are in the records of the bankruptcy court, and may not be available at all times to the bankrupt, hence the law dispenses with its necessity until the discharge is affirmatively attacked.

The adjudication in bankruptcy and the discharge in bankruptcy are judgments of the district court of the United States and should have the same effect as the judgments of that court entered in other actions and proceedings, and not only that, but the judgment of discharge is by the law evidence of the regularity of the proceeding, and the act also provides "A discharge in bankruptcy shall release the bankrupt from all of his provable

debts." The burden was not with the plaintiff-in-error to show that The Columbia Bank was not within the exceptions stated in section 17. (Jarecki & Co. v. McElwaine, 107 Fed. Rep., 249.) When the plaintiff-in-error proved that Russell & Birkett individually and as copartners had been discharged in bankruptcy and had proved the discharge in bankruptcy the plaintiff-in-error had sustained his defense, and if the claim of The Columbia Bank was not within the effect of that discharge, the duty was imposed upon The Columbia Bank of showing that fact. It offered no evidence whatever to bring itself within any of the exceptions of section 17. It did not offer a particle of proof showing or tending to show that it did not have notice in writing of the first meeting of creditors, or at least actual knowledge thereof. It offered no proof of any description, even though the plaintiff-in-error conclusively established that it did have actual knowledge of the bankruptcy proceedings as early as November 17, 1899, and even after that actual knowledge, it had a period of five months within which it might have offered its claim before the referee, for proof and allowance and had an opportunity to share in the dividends of the estate.

So we have here the case of a creditor having actual knowledge of a proceeding in bankruptcy in time to file his claim for proof and allowance, and to obtain his dividends neglecting to do so, but waiting until more than a year after the adjudication in bankruptcy — waiting until it was barred by the statute of the opportunity of proving its claim, of neglecting to avail itself of any of the provisions of the Bankruptcy Law, and then coming into court and seeking to avoid the effect of the act and the effect of a discharge of the court duly granted, and offering no proof to show either; that it did not have notice or actual knowledge of the bankruptcy proceedings and no proof to show that it came within any of the exceptions provided for in section 17 of the Bankruptcy Law.

POINT IV.

The defendant-in-error cannot escape the force and effect of subdivision 3 of section 17 of the Bankruptcy Law. We must assume that Congress, in enacting that section must have intended something by it. If it was the intent of Congress that the claims of only such creditors as had received notice in writing of the first meeting of the creditors, should be barred by the discharge, it would have so stated. Subdivision 3 then would have read: "have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt." If the law had been so enacted, then The Columbia Bank would not be bound by the discharge, but the law goes further, and says, "a discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such (3) * * * as have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or *actual knowledge of the proceedings in bankruptcy.*"

The Columbia Bank cannot claim that it is within this exception because it had actual knowledge of the proceedings in bankruptcy, and further the law does not say actual knowledge of the proceedings in bankruptcy prior to the discharge. It simply says, "actual knowledge of the proceedings in bankruptcy," and a creditor who has such actual knowledge is just as much within the intent and meaning of the law as if his claim had been duly scheduled and he had received due notice in writing of the first meeting. There is no reason why the effect of that section should be limited to such creditors as had actual knowledge prior to the discharge in bankruptcy, for the reason that any creditor has a year after the adjudication in which to appear in court and file his claim for proof and allowance. (Section 57 of the Bankruptcy Law, subd. m.) "A discharge in bankruptcy, however, may be applied for after the expiration of one month subsequent to the adjudication." And so in this case the adjudication in bankruptcy was made the 15th of April, 1899. The Columbia Bank had until the 15th of

April, 1900, in which to file its claim for proof and allowance. The Columbia Bank had actual knowledge of the bankruptcy proceedings on the 17th of November, 1899. It did nothing. Russell & Birkett might have applied for their discharge on the 15th of May, 1899, and obtained it during that month, and it certainly cannot be the meaning of the act, especially since it is not so declared in the act, that the date of discharge in bankruptcy limits the effect of section 17, subd. 3.

A bankruptcy proceeding is in the nature of a proceeding *in rem* before a court of record having jurisdiction and entitled to all presumptions as to its legality and binding effect. (Shawhan v. Wherritt, 7 How., 627; In re Watts, 190 U. S., at 32.) This is a proceeding practically to distribute the property of a bankrupt for the benefit of its creditors and the creditors have a direct representative in the proceedings, the trustee in bankruptcy.

Creditors may appear at any time, enter their appearances and join in the petition for voluntary bankruptcy, or file an answer and be heard in opposition to the petition in bankruptcy. (Sec. 59, subd. f.) Creditors may appear and prove their claims at any time within the year. (Sec. 57, subd. n.) Claims which have been allowed may be reconsidered and reallowed or rejected in whole or in part. (Sec. 57, subd. k.) After a dividend has been paid the creditors may still within the year, appear, prove their claims and receive a dividend out of the balance remaining in the hands of the trustees equal to the dividend theretofore paid to the creditors. (Sec. 65, subd. c.) Unclaimed dividends must be held for a year. (Sec. 66.)

Thus, it is evident that the only statute of limitations contained in the act with reference to the appearance of creditors and their right to share in the distribution of the estate, is the period of one year from the date of the adjudication, and the only statute of limitations with reference to obtaining a discharge is one year from the adjudication, as prescribed by section 14.

Thus, it is apparent that the one year limit is the only limitation, and there is no reason why the court should prescribe a shorter

limitation, a fluctuating limitation to subdivision 3 of section 17 of the Bankruptcy Act. There is no reason why this uniform one year limitation which prevails in all other sections of the bankruptcy act should be disregarded in construing subdivision 3 of section 17, and inserting in place of that, since no other provision is made in the act, a limitation which may vary in different cases from one month to one year. The defendant-in-error knew of the existence of the bankruptcy proceeding, the court having jurisdiction, the referee having charge of the case. It slept on its rights until it was too late to avail itself of the provision of the act. It delayed proceedings, having actual knowledge and made no effort whatever to avail itself of the provisions of the Bankruptcy Law. Then by what right of law or equity are they entitled to come into this court and ask the court to adopt a strict construction of the law, a construction that would limit the remedial and beneficial effects of that act.

It is earnestly urged in the court of appeals that this error in the schedule is a mark of fraud. The trial court made no finding of fraud, and hence that matter is not before the court, but counsel urged it in the court of appeals and will undoubtedly urge it here, and in making this charge of fraud the claim is that any bankrupt might omit any of his creditors from his schedule, and, as a result, such creditors would have no notice of the proceeding and could not come into the bankruptcy court and show cause why the bankrupt should not be adjudicated a bankrupt and show cause why a discharge should not be granted. They say that there might be reason for a bankrupt fearing that some one of his creditors might successfully make a charge of fraud or might successfully prove some one of the facts in subdivision b of section 14, that would warrant the court in refusing the discharge. There are several answers to this. In the first place, if the creditor had no notice or no actual knowledge of the proceeding in bankruptcy in time to prove his claim and have it allowed and attack any of the bankruptcy proceedings, his claim would not be barred by the discharge and would be just as good and valid as though the bank-

ruptcy proceeding had never been had. On the contrary, if he did have actual knowledge of the existence of the bankruptcy proceeding, then it became his duty to appear in the bankruptcy proceeding, prove his claims and prove anything that would warrant the bankruptcy court in refusing and extend the benefits of that act to the bankrupt. Even though he had not the written notice prescribed by the law, if he had actual knowledge within a year subsequent to the adjudication he could come into court and prove his claim, he could attack the claim of any other creditor, and compel that creditor to refund any dividend that he had received. He could attack the discharge (section 15), have it revoked if there was any reason for revoking it. He could, in fact, avail himself of every remedy, every objection and every benefit conferred by that act.

There was no fraud in this case and the trial court refused to find any fraud. We should not shut our eyes to the well-known customs that exist in the business world of to-day. A business man takes a note from his customer. If he needs money he goes to his bank and discounts that note, and to all intents and purposes the bank becomes a *bona fide* holder for value, but the bank invariably looks to its customer for payment of the note, and almost invariably discounts on the credit of the payee of the note and not upon the credit of the maker. To the payee discounting the note at the bank the bank looks for payment. So far as this case goes The Columbia Bank still has its remedy against the Manhattan Railway Advertising Company on its note. We also know where a business man has given a note to his creditor, been discounted by creditor and he desires an extension of credit, he applies to his creditor and not to the bank just as Russell & Birkett in this case applied to the Manhattan Railway Advertising Company for an extension. (Transcript, pp. 13-14.) If the creditor agrees to give an extension he will take a new note. If he does not care to grant the extension he will invariably write the same type of a letter which was written by the Manhattan Railway Advertising

Company in this case. The note is held by the bank and the bank refuses to renew it, and it is also well known that it is the custom with banks, where a defense may exist to a note held by them, for the bank to sue in its capacity as *bona fide* holder for value, and thus keep off any defenses that might be made by the maker as against the payee.

This is what was undoubtedly done in this case. The Columbia Bank was a *bona fide* holder of the note and it had actual knowledge of every fact necessary to enable it to prove its claim against Russell & Birkett and share in the dividends of the bankrupt's estate. The claim was properly scheduled against the Manhattan Railway Advertising Company, whose name undoubtedly appeared on the notebook of Russell & Birkett, and this should explain the error, but fearing, perhaps, they might not get as much a dividend as they would like, The Columbia Bank slept on its rights; it waited until the year had expired and then as an independent holder it brings this action against Clarence T. Birkett, and seeks in this way to avoid the effect of the discharge. Even if The Columbia Bank had no remedy against the Manhattan Railway Advertising Company, it was not only its right but its duty to have filed its claim for proof and allowance with the referee in bankruptcy, and where it refused to avail itself of the privileges of the Bankruptcy Law, it ought not be heard when it comes into this court and seeks to avoid the effect of that act and effect of a discharge properly and duly granted under the provisions of that act when it appears beyond any question that it had actual knowledge of the bankruptcy proceeding and ample time to avail itself of the provisions of the Bankruptcy Law. To require actual knowledge on the part of the creditor before the date of discharge would be to inject into the act another limitation prescribed by the law; a limitation that would vary in different cases; a limitation at variance with the one-year provision which seems to prevail in this law.

"It would be dangerous in the extreme, to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation. Where

words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But, if in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous that all mankind would, without hesitation, unite in rejecting the application." (U. S. Rep., vol. 182, Pirie v. Chicago Title and Trust Company, page 452.)

THOMAS CARMODY,
ROBERT G. SCHERER,
Of Counsel.